Filed 3/29/02

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re JOSH M., a Person Coming Under the Juvenile Court Law. THE PEOPLE, Plaintiff and Respondent. v. JOSH M., Defendant and Appellant.	A092885 (Alameda County Super. Ct. No. J169971)

Josh M. appeals from a juvenile court order finding that he possessed cocaine base for sale. He argues the court erroneously denied his motion to suppress evidence. We affirm.

Factual and Procedural History

Officer John Bakhit testified at a combined suppression and jurisdictional hearing. On August 22, 2000, about 11:30 a.m., Bakhit was in a marked police car and accompanied by a civilian riding along. He saw Josh and three or four other people standing on an Oakland street corner where numerous arrests for narcotics sales have been made. Bakhit saw Josh leave the group and walk toward a young woman across the street. Bakhit stopped his patrol car 20 feet away, got out and approached within 5 to 8

feet of Josh. Bakhit asked him, "Hey, can I speak to you for a second?" and Josh replied, "Yeah, what's up?" Bakhit asked Josh if he was on probation or parole. Josh said he was on probation for narcotics sales. When Bakhit asked Josh if he had a search clause, Josh answered that he had a "four-way." Bakhit handcuffed Josh for officer safety and searched him. Inside Josh's vest Bakhit found a sandwich bag containing nine individual packages of crack cocaine. Josh also had a pager on his waistband and $55 in his pants pocket. Within several minutes of the search, police sources confirmed Josh's probation search clause. Bakhit drove Josh to jail where he signed a statement admitting possession of the cocaine. Bakhit denied talking to Josh about "working off the case," indicating he never uses juveniles for that purpose.

Josh's testimony was a study in contrast. He related that Bakhit's patrol car "swooped over" to within 10 feet of him and stopped in the oncoming lane of traffic. Bakhit walked up to Josh, telling him to "come here" and asking if he was on probation or parole. Josh said he was on probation for narcotics sales. Josh felt he could not leave because Bakhit and his partner were known for "whooping people." Josh admitted, however, that he had never seen Bakhit before and did not know who his partner was until he was taken to the police station. Bakhit did not ask whether Josh had a search condition and Josh did not tell him. Bakhit searched Josh at the patrol car and then placed him inside. In the civilian's presence, Bakhit asked Josh if he knew "anybody bigger to bust" so he could give Josh a deal and let him go. Josh said he did not know anyone. The civilian left when they arrived at the police station. Bakhit advised Josh of his Miranda[1] rights, but Josh did not understand them.

Josh's 15-year-old friend Rashad testified that he was in the area when police cars arrived and blocked traffic at the corner. Rashad heard Bakhit ask Josh's name and if he was on probation. Josh identified himself and said "yeah." Bakhit then handcuffed Josh and searched him. Rashad initially said he was 8 to 10 feet away when he heard this conversation, but later estimated the distance as 25 feet.

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1 *Miranda v. Arizona* (1966) 384 U.S. 436.

The court denied Josh's motion to suppress evidence and sustained the subsequent and supplemental petitions alleging possession for sale of cocaine base. Josh was committed to the California Youth Authority.

Discussion

Josh argues, for the first time on appeal, that he should be permitted to challenge the lawfulness of his detention by Office Bakhit. At the hearing on the motion to suppress, the prosecutor requested that the court take judicial notice of the court file indicating imposition of a four-way search clause in April 2000. The prosecutor stated: "I believe [Josh has] had them off and on during his history in juvenile [court], but I believe that's the most recent reiteration of the search clause." With no defense objection, the court judicially noticed the court file of April 5, 2000 which states: "4-way search clause imposed."

On appeal, Josh has produced the transcript of the April 5, 2000, hearing in which the juvenile court ordered that Josh be placed in the home of his parents and that "[h]e's to cooperate in the search of his person, vehicle, property under his control, and room at any time of the day or night, with or without a warrant as directed by a probation officer or a police officer." Josh argues that under the terms of the court's probation order, he could only be searched, not seized, rendering the detention by Officer Bakhit beyond the scope of the search condition.

We address the merits of Josh's motion to suppress only upon the evidence adduced at the hearing. (Pen. Code, § 1538.5, subd. (h); *People v. Robinson* (1974) 41 Cal.App.3d 658, 663.) The transcript relied on by Josh on appeal was not before the juvenile court during the suppression hearing. It is not properly a part of the record we review to determine the validity of Josh's motion.

Moreover, even if the transcript were considered, Josh's argument is without merit. The consent to search includes the consent to a limited detention or seizure of the person. As stated in *People v. Viers* (1991) 1 Cal.App.4th 990, 993-994, "Permission to detain is implicit in most Fourth Amendment waivers. A detention is a seizure of the

person which is subject to Fourth Amendment protection. [Citation.] And, absent a detention the police cannot search a person and usually cannot search a container or vehicle under that person's control, items typically listed in Fourth Amendment waiver provisions."

Second, Josh contends the probation search was unlawful because it was not supported by reasonable suspicion of criminal behavior. After the Attorney General filed his opposition brief in this matter, the United States Supreme Court decided *U.S. v. Knights* (2001) 534 U.S. 112 [122 S.Ct. 587, ___ L.Ed.3d ___] (*Knights*). Both parties have brought this case to our attention. Knights was subject to a California state court probation condition permitting warrantless searches with or without reasonable cause. The dispute as presented to the Supreme Court centered on whether Knights's agreement to the search condition applied only to probation-related searches or included searches with an investigatory or law-enforcement purpose. The Court rejected Knights's argument that a warrantless search of a probationer satisfies the Fourth Amendment only if it is similar to the "special needs" search conducted by Wisconsin probation officers in *Griffin v. Wisconsin* (1987) 483 U.S. 868. The Court labeled as "dubious logic" the view "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it." (*Knights*, *supra*, 122 S.Ct. at p. 590.) Instead, the Court applied "ordinary Fourth Amendment analysis that considers all the circumstances of a search." (*Id.* at p. 593.) The Court noted that it need not decide whether Knights's acceptance of the search condition constituted consent to a complete waiver of his Fourth Amendment rights, as urged by the Government, because Knights's particular search was reasonable under the totality of the circumstances approach, with the search condition being a salient circumstance. (*Id.* at p. 591.) Addressing the balance of interests that must be accommodated, the Court observed that the probation condition significantly reduced Knights's reasonable expectation of privacy, but that the state has an interest in rehabilitation of the probationer and protecting society from future criminal violations. The Court held that "the balance of these considerations requires no more

than reasonable suspicion to conduct a search of this probationer's house." (*Id.* at p. 592.)

The Court specifically declined to address the constitutionality of suspicionless searches, stating: "We do not decide whether the probation condition so diminished, or completely eliminated, Knights's reasonable expectation of privacy (or constituted consent . . .) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." (*Knights*, *supra*, 122 S.Ct. at p. 592, fn. 6.)

Our Supreme Court has held that searches of probationers without reasonable suspicion are lawful. (*People v. Woods* (1999) 21 Cal.4th 668, 675; *People v. Reyes* (1998) 19 Cal.4th 743, 751; *People v. Bravo* (1987) 43 Cal.3d 600, 607.) Because the United States Supreme Court has not decided the question differently, California Supreme Court authority binds us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Contrary to Josh's contention, *Knights* does not require us to find Officer Bakhit's search unlawful.

Third, Josh argues that a searching officer must know of the minor's search condition before taking action. The evidence was conflicting as to whether Officer Bakhit knew before searching Josh that the minor was subject to a search condition. In denying the motion to suppress, the court made no express factual finding, in the face of conflicting evidence, as to whether Bakhit knew of Josh's search condition before searching him. Instead, the court relied on *In re Tyrell J.* (1994) 8 Cal.4th 68 to uphold the search. *Tyrell J.* holds that a warrantless search of a juvenile, even though conducted by an officer without knowledge of a probation search condition, does not violate the Fourth Amendment. Josh disagrees with *Tyrell J.*, but acknowledges that it is binding precedent against him.[2]

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[2] Initially, the Supreme Court granted review in *People v. Moss* to reconsider its holding in *Tyrell J.* that a search of a probationer subject to search clause is valid even if the searching officer was unaware of the

Fourth, Josh argues that the search was conducted for arbitrary and capricious reasons that constituted harassment. He contends Officer Bakhit's motivation for the search was simply to entice Josh to name "bigger" offenders in exchange for freedom. A juvenile retains the ability to challenge a probation search on the ground that the search was arbitrary or conducted for purposes of harassment. (*In re Tyrell J.*, *supra*, 8 Cal.4th at p. 87, fn. 5.) Josh did not raise his theory of harassment below. Citing *Green v. Superior Court* (1985) 40 Cal.3d 126, 137, Josh acknowledges that a party is not permitted to advance on appeal a new theory to support a suppression motion. However, he argues that when the evidence is fully developed by both sides, a reviewing court may consider the issue on appeal. Here, however, the evidence is conflicting. Josh testified that before the Bakhit took him to the police station, Bakhit asked whether he knew "anybody bigger to bust" and, if so, Bakhit would make a deal and let Josh go. Bakhit denied any such conversation. The trial court judges the credibility of the witnesses and resolves any conflicts in the testimony. (See *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.) Because Josh did not raise this theory below, the trial court did not make the factual determinations necessary for us to evaluate the validity of his legal argument. Under these circumstances, we do not address Josh's theory of harassment on appeal.

Fifth, Josh claims the court erroneously sustained the prosecutor's objection to defense counsel's question about the civilian who rode in Bakhit's car. In direct examination of Josh, defense counsel established that the civilian was present when Bakhit asked him to talk about others who were dealing drugs in exchange for a deal. Counsel then asked Josh: "Did the officer tell you anything about the person who was riding in the car?" When Josh answered yes, counsel asked, " What did he tell you?"

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condition. (*People v. Moss* (March 13, 2000, G024202) [nonpub. opn.], review granted June 28, 2000, S087478.) However, on January 16, 2002, the Court dismissed the petition as improvidently granted and remanded the matter to the court of appeal. Subsequently, the Supreme Court granted review in two cases from the Fifth District in which the court concluded a warrantless automobile search was unlawful even though police later discovered that three of the four occupants were on probation. (*People v. Hanks* (Nov. 14, 2001, F035120) [nonpub. opn.], review granted March 13, 2002, S102982, and *People v. Hester* (Nov. 7, 2001, F034897) [nonpub. opn.], review granted March 13, 2002, S102961.)

The prosecutor objected to the question on relevance grounds and the court sustained the objection.

Josh claims the prosecutor's relevancy objection should have been overruled, arguing that the evidence was relevant to show the search was arbitrary and capricious. As we previously discussed, harassment or capricious action was not a ground raised in juvenile court for suppression of the evidence so Josh' s argument regarding the prosecutor's objection is moot. Moreover, the court properly sustained the question on relevance grounds. Learning what Bakhit said about the civilian might have assisted counsel in discovery efforts, but it was irrelevant to the suppression motion.

Finally, the court ordered that the $55 seized from Josh be credited against the $100 restitution fine imposed by the court. Josh correctly observes that this credit is omitted from the commitment order. The juvenile court is directed to prepare an amended commitment and forward a copy to the California Youth Authority.

Disposition

The judgment is affirmed.

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Corrigan, J., Acting P.J.

We concur:

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Parrilli, J.

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Pollak, J.